Telekom's argument that safeguards are sufficient to eliminate all oversight over foreign carrier affiliation is without merit. Adopting the position that an applicant's entry could never pose a risk to competition in the U.S. market, or that we would ignore other potential impacts on the public interest, would be contrary to our statutory mandate to ensure that provision of service by any applicant, foreign or domestic, is consistent with the public interest, convenience and necessity.[94]

56. We are not, on the other hand, persuaded by the comments of some U.S. carriers that we should decline to adopt a presumption in favor of entry into the U.S. market.[95] As discussed above, AT&T and WorldCom argue that we should instead deny applications from carriers that present a likelihood of "substantial harm."[96] Ameritech contends that our proposed standard would have a "chilling effect" on petitions to deny, as it sets such a high standard.[97] These parties assert that the WTO Basic Telecom Agreement does not remove the potential for anticompetitive conduct from a large number of carriers from WTO Members. As discussed above, we find that the procompetitive changes in global telecommunications markets resulting from the WTO accord substantially reduce the need to engage in a detailed analysis of the competitive conditions of an applicant's market.[98] The worldwide simultaneous opening of telecommunications markets, coupled with the privatization and reform of telecommunications carriers that are currently government-owned, promises to alter dramatically the global market for telecommunications services. We also believe that our improved safeguards will help reduce the potential for anticompetitive conduct. Moreover, we find that adopting the proposed "substantial harm" standard could undercut the commitments made under the GATS and WTO Basic Telecom Agreement. We therefore decline to adopt the proposal of AT&T and WorldCom that we deny applications of carriers that pose a "substantial" risk to competition. Indeed, we seek to avoid protracted, fact-specific investigations that may accompany petitions to deny that would have the effect of limiting entry to the U.S. market by applicants subject to such petitions.

57. We also find no merit to WorldCom's argument that our presumption would treat foreign carriers more favorably than U.S. carriers.[99] WorldCom apparently reads our proposal to adopt a presumption in favor of entry to mean that we would presume that foreign applicants may enter the U.S. market without additional scrutiny, while U.S. carriers would be subject to a case-by-case analysis under our public interest standard. This is not the case. We clarify here that foreign carriers are subject to the same public interest standard as U.S. carriers. Our presumption in favor of entry for foreign participation applies only to competition concerns that may arise because of a foreign carrier's

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94 *See* 47 U.S.C. §§ 35, 214(a), 310(b)(4).

95 *See* AT&T Comments at 22; Worldcom Comments at 2-4.

96 AT&T Comments at 20-21; WorldCom Comments at 4-5. Although both parties propose the same standard, neither articulates what showing would be required to satisfy the standard.

97 Ameritech Comments at 6-7.

98 *See supra* ¶¶ 33-43.

99 WorldCom Comments at 5.

market power in a foreign market. We presume that foreign entry will not pose competitive concerns absent a showing that, in an exceptional case, our safeguards and potential conditions attached to the grant of authority are not sufficient to prevent a carrier from creating competitive harms in our market. We are concerned about the potential for the misuse of market power in both the foreign and domestic contexts. The measures we apply to protect against such harm may differ, however, based on the source and potential impact of the harm.[100] Nevertheless, our approach here favors neither foreign nor domestic applicants.

58. Finally, we find no merit to BellSouth's argument that we should not apply a different standard to foreign applicants seeking to enter the U.S. market than we apply to Bell Operating Companies (BOCs) seeking to enter the domestic in-region interLATA services market.[101] BellSouth contends that it would be "irrational" for the Commission to adopt a presumption that foreign applicants may enter the U.S. international services market based on the likelihood of open markets "while continuing to deny the Bell companies a chance to enter the interexchange market when their markets are in fact open."[102] We find nothing irrational about applying different entry standards to address different risks of competitive harm. We find that allowing an applicant from a WTO Member to the enter the U.S. international services market poses neither the same likelihood nor potential degree of harm that entry by a BOC into the market for in-region interLATA service poses. For example, we found in the *BT/MCI Merger Order* that BT is unlikely to become among the most significant market participants in the U.S.-U.K. outbound international services market, while BOCs possess the capability and incentive, upon authorization, to become among the most significant market participants in this market.[103] Moreover, the BOCs are subject to a detailed statutory regime that governs their entry into in-region interLATA service under Section 271 of the Act.[104] In considering entry by a foreign applicant into the U.S. international services market, on the other hand, the Commission is required to ensure that such entry is consistent with the public convenience and necessity.[105] Although entry by both types of carriers into new markets may be analogous in a general sense, we do not find that there are sufficient similarities between BOCs and foreign carriers to warrant identical treatment.

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[100] For instance, we apply different safeguards domestically to BOC, independent LEC and competitive LEC provision of in-region interexchange service. *See Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, CC Docket No. 96-149, Second Report and Order, FCC 97-142 ¶¶ 81-213 (Rel. April 18, 1997) (*LEC Regulatory Treatment Order*).

[101] *See* BellSouth Comments at 1-11; *see also* SBC Comments at 7.

[102] BellSouth Comments at 3.

[103] *BT-MCI Merger Order* ¶ 128 (finding that BT lacks any of the capabilities, operational infrastructure, brand name recognition, and reputation among U.S. customers and existing customer relationships to attract large numbers of customers quickly).

[104] 47 U.S.C. § 271.

[105] *See* 47 U.S.C. § 214(a).

b. Other Public Interest Factors

Background

59. The Commission has traditionally considered other public interest factors in evaluating applications from parties affiliated with foreign entities. In the *Foreign Carrier Entry Order*, the Commission stated that it would consider other public interest factors relevant to foreign carrier applications under Section 214 and Section 310(b)(4). Those factors include the general significance of the proposed entry to the promotion of competition in the U.S. communications market, the presence of cost-based accounting rates, and any national security, law enforcement, foreign policy and trade policy concerns brought to our attention by the Executive Branch.[106] In general, the Commission has worked closely with Executive Branch agencies to ensure that our actions and policies affecting international telecommunications do not impede or thwart the policies of the Executive Branch.[107] The Commission proposed in the *Notice* that we would continue to consider any national security, law enforcement, foreign policy, and trade concerns raised by the Executive Branch in determining whether to grant or deny an application.[108]

Positions of the Parties

60. Commenters were sharply divided over whether the Commission should consider other public interest factors, including national security, law enforcement, foreign policy and trade concerns, in evaluating applications. In general, U.S. government agencies strongly urged the Commission to maintain its existing policy regarding Executive Branch input. DOD and the FBI argue that no presumption should be applied to national security issues. They argue that every application should be reviewed on its own facts, issues should be affirmatively resolved, and the FCC should defer to the Executive Branch's findings on national security issues.[109] USTR states that we should continue to accord deference to appropriate Executive Branch agencies on the issues of national security, law enforcement, foreign policy, and trade policy.[110] Foreign carriers, however, object to the denial of a license based on foreign policy and trade concerns, but generally accept the need for the Commission to accord deference to the Executive Branch on national security and law enforcement issues.[111] Deutsche Telekom, however objects to any consideration of national security, law enforcement, foreign

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106 *See Foreign Carrier Entry Order*, 11 FCC Rcd at 3888, 3897, 3955-56 ¶¶ 38, 62, 216-219.

107 For example, the Commission worked closely with the Office of the United States Trade Representative in negotiating the WTO Basic Telecom Agreement.

108 *Notice* ¶¶ 43, 74.

109 DOD Comments at 4-9; FBI Comments at 7-9.

110 USTR Comments at 4.

111 *See, e.g.*, NTT Comments at 2; FT Comments at 5; *see also* GTE Comments at 16.

policy, and trade policy grounds outside of the narrowly defined national security exceptions contained in Article XIV of the GATS.[112]

Discussion

61. We conclude we should continue to find national security, law enforcement, foreign policy and trade policy concerns relevant to our decision to grant or deny Section 214 and 310(b)(4) applications from applicants from WTO Member.[113] As we found in the *Foreign Carrier Entry Order*, our public interest analysis would benefit from input by the Executive Branch addressing these issues.[114]

62. We recognize that other federal agencies have specific expertise in matters that may be relevant in particular cases. In any given case, an application by a foreign applicant may raise questions, for example, about this country's international treaty obligations. In addition, we realize that foreign participation in the U.S. telecommunications market may implicate significant national security or law enforcement issues uniquely within the expertise of the Executive Branch. The Commission will consider any such legitimate concerns as we undertake our own independent analyses of whether grant of a particular authorization is in the public interest.

63. We emphasize, however, that we expect national security, law enforcement, foreign policy and trade policy concerns to be raised only in very rare circumstances. Contrary to the fears of some commenters, the scope of concerns that the Executive Branch will raise in the context of applications for Section 214 authority, cable landing licenses and applications to exceed the 25 percent indirect foreign ownership benchmark in Section 310(b)(4) of the Act is narrow and well defined. National security and law enforcement concerns have long been treated as important public interest factors by this Commission.[115] We note that, during our two years' experience in administering the *Foreign Carrier Entry Order*, with approximately 140 authorizations granted to carriers with foreign ownership, the Executive Branch has never asked the Commission to deny an application on national security or law enforcement grounds. Similarly, we note that the Executive Branch, during the last two years, has never informed us that a foreign policy concern dictated that a Section 214 or 310(b)(4)

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[112] DT Comments at 18.

[113] We note that the Commission is obliged to obtain approval from the State Department and to seek advice from other Executive Branch agencies before granting a cable landing license. *See* Exec. Order No. 10,530, *reprinted as amended in* 3 U.S.C. § 301 app. at 459-60 (1994); *see also infra* Section III.C. The State Department has, on one occasion in the past two years, asked the Commission to deny a submarine cable landing license based on the criteria in the Submarine Cable Landing License Act. *See* Letter from Ambassador Vonya McCann, U.S. Coordinator, International Communications and Information Policy, Department of State, to Donald H. Gips, Chief, International Bureau, FCC (Aug. 9, 1996) (available in the International Bureau Reference Center, File No. SCL-93-001).

[114] *Foreign Carrier Entry Order*, 11 FCC Rcd at 3888, 3897, 3955-56 ¶¶ 38, 62, 216-219.

[115] *See id.*

application be denied. We expect this pattern to continue, such that the circumstances in which the Executive Branch would advise us that a pending matter affects national security, law enforcement, or obligations arising from international agreements to which the United States is a party will be quite rare. Any such input would, however, be important to our public interest analysis of a particular application. We thus will continue to accord deference to the expertise of Executive Branch agencies in identifying and interpreting issues of concern related to national security, law enforcement, and foreign policy that are relevant to an application pending before us.

64. USTR has asked, after coordination with other Executive Branch agencies, the Commission on four occasions during the last two years not to act on certain applications because of trade concerns.[116] We note that all these requests occurred before the effective date of the WTO Basic Telecom Agreement. The Agreement changes the U.S. Government's trade obligations affecting basic telecommunications services. USTR has indicated that it expects any Executive Branch concerns communicated to the Commission under our new rules to be fully consistent with U.S. law and international obligations, including the WTO Basic Telecom Agreement. USTR has also specified the scope of its authority to communicate trade policy concerns to the Commission in its reply comments.[117] In light of the WTO Basic Telecom Agreement, we expect to receive input from USTR on specific applications far less often than we have in the past. We will continue to evaluate any such input as part of our public interest determination, consistent with U.S. law and U.S. international obligations, including the WTO Basic Telecom Agreement.

65. In general, objections to the Commission considering issues raised by the Executive Branch regarding national security, law enforcement, foreign policy and trade concerns have focused on the consistency of this approach with the GATS. As discussed below, taking these concerns into account is consistent with the GATS.[118] The Department of Defense and FBI express concern that the proposed entry standard would require them to overcome a presumption in favor of granting an application.[119] As discussed above, we presume that an application from a WTO Member applicant

[116] Letter from Jeffrey M. Lang, Deputy United States Trade Representative, to Roderick K. Porter, Deputy Chief, International Bureau, Federal Communications Commission (Aug. 8, 1996); Letter from Donald S. Abelson, Chief Negotiator, Communications and Information, United States Trade Representative, to Roderick K. Porter, Deputy Chief, International Bureau, Federal Communications Commission (Oct. 3, 1996); Letter from Donald S. Abelson, Chief Negotiator, Communications and Information, United States Trade Representative, to Roderick K. Porter, Deputy Chief, International Bureau, Federal Communications Commission (Oct. 31, 1996); Letter from Larry Irving, Assistant Secretary, National Telecommunication and Information Administration, Department of Commerce, Jeffrey M. Lang, Deputy United States Trade Representative, and Ambassador Vonya McCann, U.S. Coordinator, International Communications and Information Policy, Department of State, to Reed Hundt, Chairman, Federal Communications Commission (Mar. 7, 1997).

[117] USTR Reply Comments at 6 n.11.

[118] *See infra* Section VII.

[119] DOD Comments at 4-11; FBI Comments at 6-10.

does not pose a risk of anticompetitive harm that would justify denial.[120] We do not, however, presume that an application poses no national security, law enforcement, foreign policy or trade concerns. We will continue to consider these concerns independent of our competition analysis.

66. We emphasize that the Commission will make an independent decision on applications to be considered and will evaluate concerns raised by the Executive Branch agencies in light of all the issues raised (and comments in response) in the context of a particular application. We expect that the Executive Branch will advise us of concerns relating to national security, law enforcement, foreign policy, and trade concerns only in very rare circumstances. Any such advice must occur only after appropriate coordination among Executive Branch agencies, must be communicated in writing, and will be part of the public file in the relevant proceeding.[121]

B. Section 214 Entry Standard

1. Facilities-Based, Resold Switched and Resold Non-interconnected Private Lines

Background

67. In the *Foreign Carrier Entry Order*, we applied the ECO analysis to foreign carrier applicants for Section 214 authority that seek to provide facilities-based service as well as service via switched resale and the resale of non-interconnected private lines to destination markets in which they have market power. The Commission has also applied the ECO test to all planned investment in U.S. carriers by foreign carriers above a 25 percent threshold, or at a controlling interest at any level.[122] The Commission tentatively concluded in the *Notice* that changes in global telecommunications markets resulting from the WTO commitments made by 68 other governments would substantially achieve our goals in adopting the ECO analysis, and that it was no longer necessary. Instead, the Commission tentatively concluded that it should apply its public interest analysis and presume that an application does not pose competitive risks.[123]

Positions of the Parties

68. Most parties agree that we should no longer apply the ECO test to applications from foreign carriers from WTO Members seeking Section 214 authority to provide facilities-based,

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[120] *See supra* ¶¶ 50-58.

[121] To the extent the Executive Branch must share classified information with Commission staff, such information is not subject to public disclosure.

[122] *Foreign Carrier Entry Order*, 11 FCC Rcd at 3881-88 ¶¶ 10-39.

[123] *See Notice* ¶¶ 39-44.

switched resale, or resold non-interconnected private line service.[124] As discussed generally above, there is significant disagreement regarding our public interest analysis and our proposed rebuttable presumption in favor of entry.[125]

Discussion

69. We find that it is no longer necessary or appropriate to retain the ECO analysis for foreign carriers from WTO Members seeking authority to provide facilities-based service, resale of switched services, or resale of non-interconnected private lines. As discussed above, we find that the open markets that will result from implementation of the WTO Basic Telecom Agreement, along with changes in technology and our improved regulatory safeguards, remove the need for the ECO test. Instead, foreign carriers from WTO Member countries seeking such authority will be subject to the same public interest standard we apply to all U.S. carriers. We also apply, as discussed above, a presumption in favor of entry, which presumes that a carrier's foreign ownership does not pose competitive concerns.[126] Although we are cognizant of the danger that foreign carriers with market power may be able to leverage their foreign market power into the U.S. market, we find that increased competition in global markets, together with the safeguards we adopt below, will generally prevent such anticompetitive conduct. In addition, the Commission possesses a variety of sanctions it will apply to carriers found engaging in anticompetitive conduct.[127] Thus, absent serious concerns raised by the Executive Branch regarding national security, law enforcement, foreign policy or trade issues or, in the exceptional case where a carrier's entry presents a very high risk to competition as discussed above, we will grant such applications expeditiously.[128]

70. We also conclude that our entry policy, discussed above, should apply equally to U.S. carrier investments in foreign carriers as well as foreign carrier investments in U.S. carriers. The Commission previously found in the *Foreign Carrier Entry Order* that it was unnecessary and contrary to the goals of that proceeding to apply the ECO test to U.S carrier investments in foreign carriers. The Commission determined that it had greater ability to redress anticompetitive harm by the U.S. carrier through its licenses and certifications in the United States. It also found that the ECO test would frustrate U.S. policy of encouraging foreign investment by U.S. companies.[129] Our experience

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[124] *See, e.g.*, FT Comments at 14; Telmex Comments at 4; Sprint Comments at 3; C&W Comments at 3; ETNO Reply Comments at 1-2. *Contra* AT&T Comments at 18; AT&T Reply Comments at 18; TRA Reply Comments at 6.

[125] *See, e.g.*, Sprint Comments at 7; *cf.* AT&T Reply Comments at 20; European Commission Comments at 2-3.

[126] *See supra* Section III.A.2.

[127] *See, e.g.*, 47 U.S.C. §§ 206-209.

[128] *See supra* ¶ 51.

[129] *Foreign Carrier Entry Order*, 11 FCC Rcd at 3912-14 ¶¶ 103-106.

indicates that there is a likelihood of competitive harm from an international carrier operating in the U.S. market that possesses sufficient foreign market power in a market for services necessary for the provision of U.S. international services to adversely affect competition on the U.S. end of the route, regardless of whether the entity is U.S. or foreign owned.[130] Indeed, we have on several occasions scrutinized U.S. carrier investments in foreign carriers to ensure that they would not use their control of foreign facilities and services to discriminate against unaffiliated U.S. international carriers.[131] We find that our new entry standard will rarely, if ever, prohibit a U.S. carrier from making a greater than 25 percent investment in a foreign carrier, and therefore applying the entry standard in this manner will not run counter to U.S. policy of encouraging investment in foreign countries. We also find that continuing to treat foreign carrier investments in U.S. carriers differently from U.S. carrier investments in foreign carriers could be viewed as inconsistent with U.S. GATS obligations.[132]

71. We also seek to respond to two specific issues raised by Sprint. Sprint notes that, as a result of the Commission's decision in the *Sprint Order*,[133] Sprint remains subject to the conditions imposed as a result of the investments of Deutsche Telekom and France Telecom. We clarify that some of these conditions are, or have been, addressed in a separate proceeding.[134] To the extent that conditions imposed in the *Sprint Order* are not addressed in those proceedings Sprint may seek removal of the remaining conditions by filing a request with the Commission. Sprint also argues that, in light of this *Order*, Deutsche Telekom and France Telecom should be free to acquire up to a non-controlling interest in Sprint without prior Commission approval. Sprint is subject to the rules we adopt here like any other applicant and must seek prior approval for an increase in its foreign ownership.[135]

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[130] *See infra* ¶ 140.

[131] *See Atlantic Tele-Network, Inc.*, 8 FCC Rcd 4776 (1993), *pet. for review denied sub nom. Atlantic Tele-Network Inc. v. FCC*, 59 F.3d 1384 (D.C. Cir. 1995); *see also GTE Telecom Incorporated*, Order, Authorization and Certificate, DA 96-1546 (Int'l Bur. rel. Sept. 16, 1996); *GTE Mobilnet Incorporated, on Behalf of Itself and Certain of its Corporate Affiliates*, 11 FCC Rcd 12,835 (Int'l Bur. 1996).

[132] *See infra* Section VII.

[133] *Sprint Order*, 11 FCC Rcd 1850.

[134] *See Sprint Corp., Application to Operate Additional Facilities on the U.S.-Germany Route Pursuant to Section 214 of the Communications Act*, File No. ITC-97-075, DA 97-1342 (Int'l Bur. June 26, 1997); *see also Sprint Corp., Application to Operate Additional Facilities on the U.S.-France Route Pursuant to Section 214 of the Communications Act*, File No. ITC-97-636 (Application pending); *Public Notice*, Report Tel 111-B (rel. Oct. 29, 1997) (accepting Sprint's application for filing).

[135] *See infra* Section VI.B.

2. **Provision of Switched Services over Private Lines**

Background

72. The Commission has applied an "equivalency" analysis since 1991 to applications from all carriers that seek to provide switched, basic telecommunications services using resold international private lines (also known as international simple resale or ISR).[136] The equivalency test requires that, before granting such applications, the Commission make a finding that the country at the foreign end of the private line affords U.S. carriers resale opportunities equivalent to those available under U.S. law. The *Foreign Carrier Entry Order* extended this test, with limited exception, to carriers using their authorized facilities-based private lines.[137] The *Foreign Carrier Entry Order* also restated this equivalency test in the same manner as the ECO test.[138] We adopted the equivalency requirement in order to prevent "one-way bypass" of the settlements regime by routing only inbound traffic over private lines. By engaging in such a practice, a foreign carrier is able to avoid making settlement payments to a U.S. carrier for inbound calls, but may continue to receive such payments for outbound calls.[139] The Commission has found that such "one-way bypass" could increase U.S. rates and distort competition.[140]

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[136] *See Regulation of International Accounting Rates*, Phase II, CC Docket No. 90-337, First Report and Order, 7 FCC Rcd 559, 561-562 ¶¶ 17-24 (1991) (*International Resale Order*); Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992); Third Report and Order and Order on Reconsideration, 11 FCC Rcd 12,498 (1996).

[137] Authorized U.S. carriers may use their facilities-based private lines to carry switched traffic without demonstrating equivalency for the country at the foreign end of the private line provided that (1) the carrier's private line is interconnected to the public switched network only on one end — either the U.S. end or the foreign end; and (2) the carrier is not operating the facility in correspondence with a carrier that directly or indirectly owns the private line facility in the foreign country at the other end of the private line. *See* 47 C.F.R. § 63.18(e)(4)(ii); *Foreign Carrier Entry Order*, 11 FCC Rcd at 3933-34 ¶¶ 157-161.

[138] *Foreign Carrier Entry Order*, 11 FCC Rcd at 3924-26 ¶¶ 133-38. We noted, however, two practical distinctions between the equivalency and ECO tests. First, the equivalency test applies to applications from *any* entity seeking to provide switched services via international private lines — regardless of any foreign carrier affiliation in the destination market. Second, the equivalency test requires that the *de jure* and *de facto* criteria be met at the time we make an equivalency finding, while the ECO test requires that these criteria be satisfied in the near future. *Id.* at 3926 ¶ 138.

[139] *See International Resale Order*, 7 FCC Rcd at 561 ¶¶ 17-20.

[140] *See id.*

73. In the *Notice*, the Commission tentatively concluded that the WTO Basic Telecom Agreement substantially reduces the threat of one-way bypass.[141] It also tentatively concluded, for the same reasons discussed above for other international services, that it is no longer necessary or desirable to continue to apply the equivalency test to pending or future Section 214 applications to provide switched, basic services over private lines between the United States and WTO Member countries.[142] We also note that in the *Benchmarks Order*, the Commission required that carriers seeking to provide switched services over resold or facilities-based international private lines demonstrate that settlement rates for at least 50 percent of the settled, U.S.-billed traffic on the route be at or below the appropriate settlement rate benchmark.[143] We committed to take prompt action in the event of a market distortion.[144]

Positions of the Parties

74. Most parties addressing this issue support the Commission's proposal.[145] Viatel states that removing the ECO test for the provision of switched service over private lines is timely, appropriate and will promote competition.[146] Frontier states that one-way bypass is a relatively short-term concern and the Commission should eliminate the ECO analysis for service provided to all countries, including non-WTO countries.[147] Sprint supports removing the ECO test, but stresses that

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141 *Notice* ¶¶ 48-52.

142 *Notice* ¶ 50.

143 *Benchmarks Order* ¶¶ 242-259. In light of the Commission's proposal to remove the equivalency test for resold and facilities-based private lines, the *Notice* proposed to apply the benchmark settlement rate condition to carriers seeking to provide switched services over facilities-based private lines. The Commission issued a Public Notice concurrent with adoption of the *Notice* in this proceeding inviting parties to file comments on this proposal in the *Benchmarks* proceeding. *Notice* ¶ 121; *see* Public Notice, DA 97-1173 (rel. June 4, 1997).

144 *See Benchmarks Order* ¶¶ 249-257 (adopting a presumption that a market distortion exists and enforcement action is necessary where the ratio of outbound to inbound settled traffic increases 10 or more percent in two successive quarterly measurement periods).

145 *See, e.g.*, Frontier Comments at 2-3 (arguing that the Commission should abandon the ECO test because one-way bypass is a small and relatively short-term concern); Viatel Comments at 3 (stating that the WTO Agreement will reduce the threat of one-way bypass by exerting considerable pressure for accounting rate reform); Sprint Comments at 13. *Contra* AT&T Comments at 25.

146 Viatel Comments at 3-8; Viatel also makes several arguments in opposition to the benchmark settlement rate condition that was adopted in the *Benchmarks Order*. Viatel argues that the benchmark condition inhibits competition, is unnecessary from a policy perspective, and is inconsistent with the GATS obligations of the United States. Because these arguments were addressed in the *Benchmarks Order*, we do not address them here. *See Benchmarks Order* ¶¶ 232-259.

147 Frontier Comments at 3.

the benchmark settlement rate condition is important in removing incentives to engage in one-way bypass.[148]

75. AT&T, however, opposes removing the ECO/equivalency analysis for switched services provided over private lines. It argues that the benchmarks settlement rate condition and our regulatory safeguards will be insufficient to prevent one-way bypass even after the WTO Basic Telecom Agreement goes into effect. It advocates requiring settlement rates at cost-based levels or that the Commission apply the same criteria the *Notice* proposed to apply to flexible settlement rate arrangements (i.e., a presumption in favor of granting a flexibility petition that could be rebutted by a showing that the foreign carrier that is party to the alternative settlement arrangement does not face competition from multiple facilities-based carriers).[149] Finally, AT&T also argues that only inbound ISR should be regulated and that U.S. carriers should be free to bypass high foreign settlement rates through the use of outbound switched services over private lines.[150] We also note that in the *Benchmarks* proceeding, several commenters supported allowing carriers to provide service to markets that do not meet our benchmark settlement rate condition, but that do satisfy our equivalency analysis. We stated there that we would address those commenters' concerns in this proceeding.[151]

Discussion

76. For the reasons explained below, we find that it is no longer necessary or appropriate to apply the equivalency test for carriers seeking to provide switched services over private lines that terminate in WTO Member countries. As a result of the market opening commitments of WTO Members and the resulting opening of global markets, as well as the adoption of our benchmark settlement rate condition, we find that "one-way bypass" will be far less of a concern as countries' WTO commitments are implemented.

77. In the Commission's *International Resale Order*, we concluded that the public interest in cost-based international telecommunications services would be served by the adoption of policies that encourage resale.[152] We find that there continue to be great benefits resulting from international private line resale and the carriage of switched services over facilities-based private lines. Because these services carry traffic outside of the traditional settlement rate system, carriers are able to offer service at reduced costs. The result is strong pressure to lower settlement rates and reduce consumer prices.

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148 Sprint Comments at 12-14.

149 AT&T Comments at 34, 36; *see Notice* ¶ 151; *see also infra* Section V.E.

150 AT&T Reply Comments at 28; *see also* Frontier Comments at 3-4.

151 *See Benchmarks Order* ¶ 258.

152 *See International Resale Order*, 7 FCC Rcd at 560-61 ¶¶ 15-16.

78. The Commission has long been concerned, however, about one-way bypass. One-way bypass exacerbates the settlements deficit and ultimately may lead to higher prices for consumers. In the *International Resale Order*, the Commission imposed the equivalency requirement to ensure that U.S. carriers and consumers would not be injured by our pro-resale policy.[153] Contrary to Viatel's assertion, the fact that we have not had to take action against carriers for one-way bypass does not mean that one-way bypass is not a problem, but rather that our equivalency policy has been effective in preventing such conduct.[154] Despite the increase in global competition that will result from implementation of the WTO Basic Telecom Agreement, the potential for one-way bypass in the U.S. international services market still exists in markets that are not yet fully open to competition.[155] We find, however, that the settlement rate benchmark condition we adopted in our *Benchmarks Order* is sufficient to address our concern about one-way bypass.

79. Pursuant to the Section 214 authorization condition adopted in the *Benchmarks Order*, we will authorize carriers to provide switched services over international facilities-based or resold private lines[156] on the condition that settlement rates for at least 50 percent of the settled U.S.-billed traffic on the route or routes in question are at or below the relevant benchmark adopted in that *Order*. If, after a carrier has commenced providing service, we learn that one-way bypass is occurring, we will take enforcement action. That enforcement action may include a requirement that carriers be prohibited from using their authorizations to provide switched services over private lines until settlement rates for at least 50 percent of the settled U.S.-billed traffic on the route are at a level equal to or below the best practice rate we adopted in the *Benchmarks Order*, $0.08,[157] or a revocation of carriers' authorizations to provide service. We adopted a rebuttable presumption that one-way bypass is occurring if the percentage of outbound traffic relative to inbound traffic increases by 10 or more

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153 *See id.*, 7 FCC Rcd at 561-562 ¶¶ 17-22. The *International Resale Order* required carriers seeking authority to carry switched traffic over private lines to demonstrate that the destination country offers equivalent resale opportunities. *See also ACC/Alanna*, 9 FCC Rcd 6240 (1994); *fONOROLA and EMI*, 7 FCC Rcd 7312 (1992), *recon.*, 9 FCC Rcd 4066 (1994).

154 *See* Viatel Comments at 3.

155 *See* Sprint Comments at 2-3 (citing its observation of "sufficient instances of substantial and unexplained deviation of its return traffic from some foreign countries to know that inbound bypass issues are not an illusion").

156 We note that these are services interconnected to the public switched network on one or both ends.

157 The "best practice rate" is based on the lowest, commercially viable, settlement rate paid today by U.S. carriers to an overseas carrier from a competitive market. In the *Benchmarks Order*, we determined that this was the $0.08 rate that U.S. carriers pay on average with Sweden. We stated that we will revisit this rate in the future, as market conditions warrant. We also stated that we will consider, on a case-by-case basis, other factors that may influence the level of the best practice rate applied to individual carriers where the best practice rate adopted by the Commission does not accurately reflect a carrier's costs of providing international termination service. *Benchmarks Order* ¶¶ 65-66.

percent in two successive quarterly measurement periods and reserved the right to investigate other shifts in the inbound/outbound ratio to determine whether one-way bypass is occurring.[158]

80. In the *Benchmarks Order*, the Commission concluded that the benchmark condition would best balance the Commission's desire to encourage the provision of switched services over private lines and at the same time limit the potential for one-way bypass.[159] We do not alter that finding here.[160] To the extent that carriers providing service outbound from the United States have low cost alternatives to terminate traffic on the route in question, one-way bypass would not have a significant effect on the U.S. settlements payment and on prices paid by U.S. consumers. We expect that any carrier or combination of carriers with 50 percent of the market for termination of U.S. outbound traffic would have sufficient capacity to handle all the traffic from U.S. carriers.[161] We therefore find that, in light of the commitments of our trading partners to allow entry by U.S. carriers and to require that carriers allow interconnection of competing providers, our benchmarks condition and other safeguards are sufficient to prevent one-way bypass and that an equivalency analysis is no longer necessary. We will however, as discussed above, take effective measures to ensure that carriers providing switched services over private lines do not engage in one-way bypass.[162]

81. We decline to adopt AT&T's proposal that we maintain the ECO/equivalency test. AT&T maintains that a significant danger of one-way bypass exists from carriers from WTO countries that have not made commitments or that have made limited commitments, and that we should continue to evaluate such applications under our equivalency analysis to ensure that carriers from those countries are unable to distort competition in the U.S. market. We do not agree with AT&T. For the reasons discussed above with regard to our general entry analysis,[163] we expect that the increasingly competitive global environment will encourage governments to liberalize and discourage anticompetitive conduct such as one-way bypass. We also find that maintaining the equivalency test for countries that have made no or limited market access commitments is unnecessary because our benchmarks condition and accompanying enforcement measures, along with our generally applicable safeguards, will remove incentives for one-way bypass and deter such conduct by U.S. and foreign

[158] We amended our reporting requirements in Section 43.61 of our rules to enable us to detect one-way bypass. We now require that quarterly traffic reports be filed by certain common carriers in addition to the annual Section 43.61 traffic report. *See* 47 C.F.R. § 43.61.

[159] *Benchmarks Order* ¶¶ 242-259.

[160] We note that parties filed comments in this proceeding addressing the benchmark condition for provision of switched services over private lines. Because we explicitly stated in the *Notice* that we would decide whether to adopt the condition in the *Benchmarks* proceeding, comments on the condition filed in this proceeding are outside the scope of issues raised in the *Notice*. *See Notice* ¶ 119.

[161] *See Benchmarks Order* ¶¶ 243-244.

[162] *See supra* ¶ 79.

[163] *See supra* ¶ 39.

carriers. We also find that maintaining the equivalency test only for countries that have made no commitments or limited commitments could be viewed negatively by other WTO Members and damage our trading relationships.

82. AT&T's proposed alternatives to the equivalency analysis are equally without merit. AT&T suggests that the Commission adopt a "cost-based settlement requirement," or apply the same standard for switched services over private lines as we do for accounting rate flexibility.[164] We agree with AT&T that settling all traffic on a particular route at cost-based rates would remove the incentive for one-way bypass. Requiring cost-based rates, however, would effectively preclude any carrier from continuing to provide switched service over international private lines to countries currently considered equivalent because none settle their traffic at cost. Further, as discussed in the *Benchmarks Order*, we lack accurate data on foreign carriers' costs; therefore, we would be unable, under AT&T's proposal, to determine whether a particular rate complied with our condition.[165] We also note that adopting such a strict condition would seriously restrict the provision of switched services over private lines to all but the most liberalized of countries, eroding the capacity of this service to drive collection rates lower and settlement rates toward cost. To the extent incentives to engage in one-way bypass remain, the mechanism we adopted in the *Benchmarks Order* for detecting one-way bypass will provide a timely remedy.[166] Finally, adopting AT&T's proposal would severely restrain the ability of new entrants to provide service in the United States, denying consumers the benefits of increased competition.

83. We also decline to adopt AT&T's proposal that we require carriers that seek to provide switched services over private lines to be subject to the same standard we adopt for allowing a flexible settlement arrangement.[167] Our *Flexibility Order* governs carriers who wish to exchange switched traffic in a traditional half-circuit correspondent arrangement, but in a manner that deviates from our international settlements policy (ISP).[168] As discussed below, in this *Order* we remove the requirement

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[164] AT&T Comments at 34-36.

[165] *See Benchmarks Order* ¶¶ 42-43.

[166] *Id.* ¶ 248. In the *Benchmarks Order*, the Commission adopted a rebuttable presumption that one-way bypass is occurring if the percentage of outbound traffic relative to inbound traffic increases by 10 or more percent in two successive quarterly measurement periods and reserved the right to investigate other shifts in the inbound/outbound ratio to determine whether one-way bypass is occurring. *Id.* ¶ 249.

[167] AT&T Comments at 40-43; *see infra* Section V.E.

[168] *See Flexibility Order* ¶¶ 10-27. The *Flexibility Order* allows carriers to enter into flexible settlement rate arrangements under terms and conditions that deviate from our International Settlements Policy, which requires equal division of accounting rates, nondiscriminatory treatment of U.S. carriers, and proportionate return of inbound traffic. *See Implementation and Scope of the International Settlements Policy for Parallel Routes*, CC Docket No. 85-204, Report and Order, 51 Fed. Reg. 4736 (Feb. 7, 1986) (*ISP Order*), *modified in part on recon.*, 2 FCC Rcd 1118 (1987) (*ISP Reconsideration*), *further recon.*, 3 FCC Rcd 1614 (1988); *see also Regulation of International Accounting Rates*, 6 FCC Rcd 3552 (1991), *on recon.*, 7 FCC Rcd 8049 (1992).

that an applicant for such a flexibility arrangement satisfy the ECO test, and instead adopt a presumption that flexibility is in the public interest. Our flexibility framework retains, however, measures to ensure that the discrimination concerns upon which the ISP is based are adequately addressed.[169] We do not believe the same standards or safeguards we use in the flexibility context would be appropriate to address the distinct one-way bypass concern related to switched traffic carried over private lines.[170] As discussed above, we find that more tailored safeguards, most notably the benchmark settlement rate condition, will best serve to prevent one-way bypass, while offering carriers maximum freedom to provide switched service over private lines. We also find that subjecting carriers that provide switched traffic over private lines to the flexibility rules would expose them to an additional layer of regulation, needlessly causing additional expense and delay for carriers seeking to provide this service.

84. We also fail to see the merits of removing all restrictions on outbound traffic, while maintaining our benchmarks condition and other safeguards for inbound traffic as AT&T proposes. Adopting AT&T's proposal would allow U.S. carriers to engage in one-way outbound bypass. Such carriers could terminate outbound traffic in a foreign country without making settlement payments while collecting such payments from the foreign carrier for inbound traffic. Although adopting this proposal would not directly exacerbate the U.S. settlements deficit, it has other significant problems. Adopting AT&T's proposal to allow one-way outbound bypass could funnel traffic off the settlements process to the detriment of the foreign carrier. Since we seek to prevent one-way inbound bypass from foreign markets, allowing U.S. carriers to engage in this practice to foreign markets could set a poor example to countries implementing their own WTO commitments and would run contrary to our interest in maintaining stable relationships with our trading partners. In addition, since AT&T's proposal would allow the private line to be interconnected to the public switched network on both ends, it would be difficult to determine whether a carrier authorized to provide service on an outbound basis only is in actuality also providing one-way *inbound* service. We find that the danger of one-way bypass from carriers offering such an arrangement could be significant.[171]

85. We decline to adopt AT&T's proposal that we continue to apply the equivalency test to applicants seeking to serve WTO Member countries. We do find, however, that carriers seeking authorization to provide switched services over private lines should be given the option of satisfying our existing equivalency criteria, where they are unable to satisfy the benchmarks condition, as

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[169] *See infra* Section V.E. This presumption in favor of flexibility can be rebutted by a showing that the foreign carrier that is party to an alternative settlement arrangement does not face competition from multiple facilities-based carriers.

[170] *See Benchmarks Order* ¶¶ 232-259.

[171] Ordinarily, the *Benchmarks* condition would prevent a carrier from engaging in such a conduct by imposing a presumption that one-way bypass is occurring, and that enforcement action is necessary where the ratio of inbound to outbound settled traffic increases by 10 percent or more. Because AT&T proposes that we exempt one-way switched traffic over private lines from our *Benchmarks* condition, this safeguard would not apply.

suggested by several parties in the *Benchmarks* proceeding.[172] We adopted our benchmarks condition as a mechanism to address one-way bypass. There may be cases however, where a carrier could not satisfy the benchmark condition but could satisfy the equivalency test, which, as discussed above, was adopted to prevent one-way bypass.[173] In such cases, there would be no concern about one-way bypass and it would be in the public interest to allow carriers to provide switched services over private lines. In fact, allowing carriers to provide switched services on equivalent routes should reduce the settlement rates on those routes to a level well below the benchmark rate. As we stated in the *International Resale Order*, the provision of switched services over private lines exerts downward pressure on settlement rates and collection rates on both ends of a route.[174] Thus, we should encourage the development of such services to the greatest extent possible consistent with our goal of preventing the market distortions that result from one-way bypass.

86. We codify these policy decisions in Sections 63.17, 63.18, and 63.21 of our rules.[175] Sections 63.18 and 63.21 specify our Section 214 filing requirements and certain conditions applicable to U.S. international common carriers, respectively. Section 63.17 permits U.S. carriers to engage in "switched hubbing" of U.S.-inbound and U.S.-outbound switched traffic through equivalent countries in accordance with the provisions of that rule.[176] Consistent with the policies adopted in this Section for the provision of switched services over private lines between the United States and WTO Member countries, we amend Section 63.17 to permit switched hubbing of U.S. traffic through WTO Member countries that we have determined satisfy either our equivalency standard or our *Benchmarks* condition. We also reiterate here the Commission's general view that "the international resale policy is not undermined by the routing of switched traffic via end-to-end private lines extending from the United States through one equivalent to a third equivalent country." We extend this policy to include the routing of switched traffic via end-to-end private lines through and to WTO Member countries that we have determined meet our *Benchmarks* condition.

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172 *See Benchmarks Order* ¶ 258.

173 *See supra* ¶ 72.

174 *International Resale Order*, 7 FCC Rcd at 561 ¶ 16.

175 *See infra* Appendix C.

176 Section 63.17(b) permits a U.S. carrier to route U.S.-outbound traffic over U.S. international private lines that terminate in equivalent countries and then to forward that traffic to a third, non-equivalent country by taking at published rates and reselling the IMTS of a carrier in the equivalent country. The rule also permits U.S. carriers to route U.S.-inbound switched traffic in a similar manner. *See infra* note 322.

C. Foreign Ownership under the Submarine Cable Landing License Act

Background

87. Pursuant to Executive Order 10530,[177] the Commission has been delegated the President's authority to grant licenses for the landing and operation of submarine cables.[178] The Executive Order requires us to obtain the approval of the State Department, and, as appropriate, to seek advice from other Executive Branch agencies, before granting any such license. The *Notice* proposed to end our policy of applying an ECO-type analysis as part of our inquiry under Section 2 of the Submarine Cable Landing License Act.[179] We tentatively concluded that, because of the market opening commitments made by other countries in the WTO negotiations, our concerns with respect to opening foreign markets and eliminating the opportunity for anticompetitive conduct have largely been satisfied with respect to WTO Member countries. We therefore proposed to eliminate the ECO test and to grant most applications unless the State Department disapproves or there is some other compelling public interest reason, consistent with our discretion under the Submarine Cable Landing License Act, to deny a particular application.

88. We sought comment on those proposals and specifically on whether there are circumstances in which grant of a cable landing license would pose such a high risk to competition that we should exercise our discretion to deny an application. We also sought comment from the Executive Branch and from other interested parties regarding what conditions should be placed on cable landing licenses.[180]

Positions of the Parties

89. Many parties' general comments regarding use of the ECO test are equally applicable in this context, and we have considered them in that light. This Section addresses those comments that focused specifically on cable landing licenses.

90. Most parties commenting specifically on our proposals for cable landing licenses support replacing the ECO test with an open entry policy.[181] Some commenters argue that we should not

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[177] Exec. Order No. 10,530, *reprinted as amended in* 3 U.S.C. § 301 app. at 459-60 (1994).

[178] Submarine Cable Landing License Act, 47 U.S.C. §§ 34-39.

[179] *Notice* ¶ 62; *see Telefónica Larga Distancia de Puerto Rico, Inc.*, File Nos. ITC-92-116-AL, SCL-93-001, ITC-93-029, Memorandum Opinion and Order, 12 FCC Rcd 5173 (1997); *Cable & Wireless, plc*, File No. SCL-96-005, Cable Landing License, FCC 97-204 (rel. June 20, 1997).

[180] *Notice* ¶¶ 62-64.

[181] *See, e.g.*, Telefónica Internacional Comments at 1, 3, 4; FT Comments at 24; Letter from Larry Irving, Assistant Secretary for Communications and Information, National Telecommunications and Information Administration (NTIA), U.S. Department of Commerce, to William E. Kennard, Chairman, FCC, at 2

retain the discretion to deny applications for other public interest reasons. Sprint argues that if a particular application raises concerns about risks to competition, the license should be granted subject to conditions to guard against anticompetitive conduct.[182] Deutsche Telekom states that denying or conditioning a cable landing license based upon Executive Branch preferences or "other compelling public interest reason[s]" would violate the GATS principles involving market access, MFN, national treatment, and domestic regulation.[183] France Telecom states that the Commission should not use the "compelling public interest reasons" caveat as a way to reintroduce ECO-related factors back into the analysis.[184]

91. WorldCom opposes our proposal to grant most cable landing licenses routinely. WorldCom is concerned that the WTO Basic Telecom Agreement has not substantially eliminated the risk that WTO Member countries will not allow U.S. carriers to land and operate cables, and that these asymmetric market opening commitments will significantly disadvantage U.S. carriers. WorldCom urges us to retain adequate discretion to consider any and all factors bearing on the public interest, including whether a cable would raise the potential for anticompetitive leveraging of bottleneck facilities by foreign carriers.[185]

92. DOD states that it is not necessary in every instance for the Commission to impose a restriction on the ownership of cable landing stations. DOD states that, should it have a concern in a particular situation, it can address that concern under the procedures of Executive Order 10530. Alternatively, DOD states, the Commission could impose the conditions contained in the agreement that DOD and the FBI reached with MCI Telecommunications Corporation and British Telecommunications plc in the context of their proposed merger. In that agreement, DOD determined that U.S. ownership of cable landing stations was unnecessary because the companies agreed to other terms and conditions that assured U.S. control of the facilities in the event of presidential exercise of war powers under 47 U.S.C. § 606. DOD states that, should the Commission impose the conditions contained in that agreement, we will have addressed all of DOD's concerns relating to cable landing stations, and no ownership restriction would be necessary.[186]

Discussion

93. We adopt our proposal to apply our new open entry policies to applications to land and operate submarine cables from WTO Member countries in the United States. In general, the market

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(Nov. 5, 1997).

[182] Sprint Comments at 15-16.

[183] DT Comments at 33 n.29. These arguments are addressed in Section VII, *infra*.

[184] FT Comments at 24.

[185] WorldCom Comments at 7-8.

[186] *Ex Parte* Presentation of the Secretary of Defense (filed Oct. 16, 1997) at 3.

opening commitments of other WTO Member countries, together with our ability to condition both cable landing licenses and Section 214 authorizations and to deny licenses in exceptional circumstances, render the ECO test unnecessary. We will continue to analyze each application in the manner described above[187] while seeking the approval of the State Department as required by Executive Order 10530.

94. We do not agree with WorldCom that remaining risks to competition require that we not routinely grant cable landing licenses. We anticipate that the WTO Basic Telecom Agreement will significantly reduce the opportunities for carriers with bottleneck control on the foreign end of a cable to harm competition in the U.S. market by acting anticompetitively. Because 52 countries committed to granting market access for international services, alternative routing options will almost always be available. Even if a particular application presents unusual risks to competition, most potential problems can be addressed by imposing conditions on the license.

95. When there is a danger of inadequate common carrier capacity on submarine cables to a particular destination, we have the authority to require that any new or existing cables be operated on a common carrier basis. We can also impose conditions on cable landing licenses short of requiring that they be operated on a common carrier basis. For example, the International Bureau recently imposed recordkeeping requirements on a licensee where it was deemed necessary to address anticompetitive concerns specific to the proposed submarine cable.[188] We have also traditionally required that a non-common carrier licensee not acquire any exclusive arrangement to land cables.[189] Furthermore, neither the owner of a non-common carrier submarine cable nor any common carrier may provide common carrier service over the cable without obtaining Section 214 authority and becoming subject to our common carrier regulation, including the safeguards we adopt here.[190] In exceptional cases where no conditions would adequately address a very high risk to competition, we could deny an application.

96. Finally, we will no longer routinely impose a restriction on foreign ownership of cable landing stations. Should the Department of State, pursuant to Executive Order 10530, condition its

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[187] *See supra* Section III.A.

[188] *See General Communication, Inc.*, File No. SCL-97-003, DA 97-2357, ¶¶ 33, 40(5) (Int'l Bur., Telecom. Div., rel. Nov. 7, 1997) (ordering the licensee to maintain complete records including the percentage of circuits conveyed on the cable, to whom capacity is sold, and on what terms and conditions); *see also* 47 U.S.C. § 35 (providing that a cable landing license may be granted "upon such terms as shall be necessary to assure just and reasonable rates and service in the operation and use of cables so licensed").

[189] *See, e.g., SSI Atlantic Crossing LLC*, File No. SCL-97-002, DA 97-2034, ¶ 15(4) (Int'l Bur., Telecom. Div., rel. Sept. 23, 1997).

[190] *See infra* Section V.

approval of a particular cable landing license on such a restriction, we will include a condition to that effect in the particular cable landing license.[191]

D. Section 310(b)(4) Standard for Indirect Foreign Ownership of Radio Licensees

Background

97. Section 310(b)(4) of the Communications Act allows the Commission to deny or revoke a common carrier, broadcast, or aeronautical radio license if more than 25 percent of an entity that controls the applicant or licensee is owned of record or voted by aliens, foreign governments or their representatives, or foreign corporations and the Commission finds that denial or revocation would serve the public interest.[192] In the *Foreign Carrier Entry Order*, we adopted an ECO test as part of this public interest analysis under Section 310(b)(4) for common carrier radio licensees. We found that opening the U.S. market to foreign investment to the extent foreign countries do so in their markets would best serve our goals of promoting competition, preventing anticompetitive conduct, and opening foreign markets.[193]

98. In the *Notice*, we proposed to eliminate the ECO test as part of the Section 310(b)(4) public interest analysis for common carrier radio licensees or applicants with indirect foreign investment from WTO Member countries. We proposed to simplify our review of such foreign investment and to presumptively allow any amount of indirect investment by investors whose home markets are in WTO Member countries. We stated that we would continue to consider public interest factors, including any national security, law enforcement, foreign policy, or trade concerns brought to our attention by the Executive Branch, and that we would deny applications that pose a very high risk to competition that could not be addressed by conditions that we could impose on the license.[194]

99. We sought comment on all of our tentative conclusions and particularly on whether any specific criteria might be relevant under Section 310(b)(4). We also asked whether we need to continue to review increases in foreign ownership that do not effect a transfer of control where we have already approved a licensee's request to exceed the 25 percent foreign ownership benchmark. In addition, we asked whether we should examine the extent of a WTO Member's commitment or its

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[191] Any such restriction would be necessary to protect the national security of the United States.

[192] 47 U.S.C. § 310(b)(4). We note that, as pointed out by the Wireless Cable Association International, Inc., the foreign ownership restrictions in Section 310(b) do not apply to non-broadcast, non-common carrier services and facilities. *See* WCA Comments at 1-5.

[193] *See Foreign Carrier Entry Order*, 11 FCC Rcd at 3944 ¶ 186.

[194] *Notice* ¶¶ 74-75.

implementation of that commitment in determining whether a particular application presents competition problems that must be addressed.[195]

100. The *Notice* tentatively concluded that we would continue to determine a foreign investor's home market by applying a "principal place of business" test. We sought comment on that conclusion and on whether the GATS concept of "service supplier" of a WTO Member should affect that analysis.[196]

101. The *Notice* also sought comment on our tentative conclusion that we would not change our *ad hoc* approach toward indirect foreign ownership of aeronautical licenses because experience has shown that approach to be appropriate.[197]

Positions of the Parties

102. Several commenters generally support our proposal to remove the ECO test and further liberalize our rules on foreign investment.[198] They point out the benefits to the U.S. wireless markets of facilitating foreign investment.[199] No commenter disputes our tentative conclusion that, because common carrier wireless markets are, for the most part, wholly domestic, foreign investment in those services does not implicate the anticompetitive dangers that we see in the Section 214 context.[200] In fact, AT&T, which supports retaining a standard similar to the ECO test for Section 214, supports eliminating the ECO test for Section 310(b)(4) analyses because it agrees that similar anticompetitive dangers do not exist.[201] Sprint states that it is unlikely that non-controlling investments would ever pose a threat to competition in the United States.[202]

195 *Id.* ¶ 75.

196 *Id.* ¶ 76.

197 *Id.* ¶ 70.

198 *See, e.g.*, Sprint Comments at 16; Telecom Finland Comments at 6; WinStar Comments at 4-5; New T&T Hong Kong Comments ¶ 5.1; Telefónica Internacional Comments at 1, 3, 4; Indus Comments at 5; Letter from Larry Irving, Assistant Secretary for Communications and Information, National Telecommunications and Information Administration (NTIA), U.S. Department of Commerce, to William E. Kennard, Chairman, FCC, at 2 (Nov. 5, 1997).

199 *See, e.g.*, FT Comments at 24; WinStar Comments at 5; Indus Comments at 5-6.

200 *Notice* ¶ 73.

201 AT&T Reply Comments at 10. AT&T nevertheless states that the removal of restrictions on foreign ownership should not be applied in a manner that defeats other neutral grounds for investment limitations, such as those imposed on C- and F-block licensees. *Id.*

202 Sprint Comments at 17-18.

103. NextWave argues that there is "no conceivable risk to competition" in the U.S. market from indirect foreign ownership in C- and F-block licensees because those licenses are held by entrepreneurs who are new entrants into the markets.[203] Therefore, NextWave argues, the Commission should conclude that indirect foreign investment above 25 percent in C- and F-block personal communications systems (PCS) licensees by any entity whose home market is a WTO Member country serves the public interest and will be subject only to a Commission notification requirement. NextWave notes that its proposal would not affect transfers of control, which would remain subject to Commission review or approval whether the investor is domestic or foreign.[204] In the alternative, if we continue to require prior approval, NextWave urges the Commission to establish an expedited process for reviewing such applications.[205]

104. Telephone and Data Systems suggests that we need not review indirect foreign ownership of common carrier radio licensees held in the form of registered securities when the investor is from one of the 64 other WTO Member countries that has committed to enforce fair rules of competition for basic telecommunications and is not a carrier.[206] Such investments, TDS argues, are passive investments that the Commission has, in the past, decided are not important to the Section 310(b)(4) public interest analysis. We could instead rely on after-the-fact reporting requirements and retain the right to cause divestiture of ownership interests that we find to be inconsistent with the public interest. TDS suggests that we could scrutinize SEC filings to monitor foreign ownership of registered securities.[207] Under TDS's proposal, prior approval would continue to be required for investment in excess of 25 percent held by investors from other WTO Member countries, by investors from non-WTO countries, and by any foreign carrier.

105. Some commenters, including USTR, do not oppose our consideration of competitive risks in the context of Section 310(b)(4).[208] USTR states that our proposal to continue to apply a public interest test is consistent with U.S. commitments under the GATS.[209] Other parties argue, as they do in other contexts, that denial on the grounds of risks to competition or other public interest factors might be inconsistent with U.S. international obligations.[210] Deutsche Telekom argues further that GATS principles prohibit the U.S. Government from imposing conditions upon approvals that it

[203] NextWave Comments at 6.

[204] *Id.* at 7.

[205] *Id.* at 8.

[206] TDS Comments at 3 & passim.

[207] *Id.* at 9-11.

[208] *See, e.g.*, Telecom Finland Comments at 6; Indus Comments at 6-7.

[209] USTR Comments at 3.

[210] Telefónica Internacional Comments at 5; DT Comments at 32-33; Sprint Comments at 17.

does not impose upon U.S.-owned licensees.[211] Some parties contend that our consideration of Executive Branch concerns regarding national security, law enforcement, foreign policy, and trade policy violates GATS principles.[212]

106. The FBI states that special national security and law enforcement concerns are presented by foreign ownership or control of, or influence over, common carrier radio licenses — concerns that are not presented when a license is held by a U.S. citizen or entity. Those concerns include (1) foreign-power-sponsored interceptions of U.S. communications for intelligence purposes; (2) compromise of U.S. Government efforts to conduct electronic surveillance for law enforcement or national security purposes against foreign targets associated with the home country of a foreign-owned telecommunications carrier; (3) exposure to the home government of the foreign-owned carrier of sensitive governmental and private-sector information maintained in common carrier records, databases, and central office facilities; (4) exposure of intercept capabilities and vulnerabilities of U.S. law enforcement and intelligence agencies; and (5) compromise of the National Security Emergency Preparedness functions that all U.S. telecommunications licensees are expected to perform in the event of a national emergency.[213] The FBI states that our current public interest review process under Section 310(b)(4) has worked well.[214] By contrast, J. Gregory Sidak argues that DOD and the FBI appear to overestimate the scope and efficacy of Section 310(b)(4) as a tool of national security.[215]

107. We sought comment on whether we should continue to review increases in foreign ownership (that do not result in transfers of control) by licensees that have already obtained approval to exceed the 25 percent benchmark. All parties who addressed the issue except the FBI opposed our continuing to review those increases. They argue that those increases serve the public interest and will never pose a threat to competition.[216] The FBI argues that we must review each increase in foreign ownership in order to determine whether it will effect a transfer of control, which might effectively happen at a level below 50 percent. Even if the transaction does not result in a transfer of control, the

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[211] DT Comments at 32 n.27.

[212] *See, e.g., id.* at 32; FT Comments at 5. We assume that other parties' comments about the GATS-consistency of the public interest analysis that we described in the *Notice* are intended to apply in this context as well. These comments are addressed in Section VII, *infra*.

[213] FBI Comments at 3-4.

[214] *Id.* at 4.

[215] Sidak Reply Comments at 2; *see also* J. Gregory Sidak, *Foreign Investment in American Telecommunications* chs. 2, 3.

[216] *See* Sprint Comments at 18; FT Comments at 24-25; NextWave Comments at 10; Telecom Finland Comments at 6.

FBI argues, the increased foreign influence may present public interest concerns, including national security and law enforcement concerns.[217]

108. Telecom Finland argues that, because a weak or unfulfilled commitment is no better than no commitment, we should consider the extent of a WTO Member country's commitment or its implementation of that commitment in determining whether to allow indirect investment by that country's entities in common carrier radio licensees.[218] NextWave and Telefónica Internacional oppose such an inquiry, because it would be time-consuming, it might violate U.S. WTO obligations, and those concerns are properly addressed in WTO dispute resolution.[219]

109. Sprint and Telecom Finland support our retaining the "principal place of business" definition of an applicant's or licensee's "home market." They state that the test has been workable and has accurately determined the appropriate home market of a foreign investor.[220] Sprint comments that it remains to be seen whether the test will continue to be workable in the future, when different kinds of alliances, ventures, and partnerships apply for common carrier radio licenses.[221]

110. On the issue of aeronautical licenses, Société Internationale de Télécommunications Aéronautiques (SITA), which provides aeronautical enroute services in Europe, argues that the Commission should allow competition in the provision of aeronautical services in the United States. SITA contends that aeronautical service is a basic telecommunications service and is therefore covered by the WTO Basic Telecom Agreement. It argues that our *ad hoc* approach to analyzing indirect foreign ownership of aeronautical licensees violates GATS requirements and that our "one station licensee per location" rule is inconsistent with U.S. market access and national treatment obligations. ARINC, the sole aeronautical licensee for most of the locations in the United States, argues that the WTO Basic Telecom Agreement does not apply because aeronautical services are not basic telecommunications; that, in any event, the Commission's current policies are consistent with U.S. WTO commitments; and that the "one station licensee per location" rule is essential to the continued safe and fair operation of the aeronautical enroute service and to efficient spectrum management.[222] The European Union joins SITA in arguing that the *ad hoc* approach to foreign ownership is contrary to U.S. WTO obligations.[223]

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217 FBI Comments at 10-11.

218 Telecom Finland Comments at 7.

219 NextWave Comments at 9-10; Telefónica Internacional Comments at 3, 16.

220 Sprint Comments at 16 n.20; Telecom Finland Comments at 8.

221 Sprint Comments at 16 n.20.

222 ARINC Reply Comments at 12-14.

223 European Commission Comments ¶ 17.

Discussion

111. We adopt our proposal as refined in the following paragraphs. We conclude, pursuant to Section 310(b)(4), that it would not serve the public interest to deny or revoke a common carrier, aeronautical enroute, or aeronautical fixed radio station license pursuant to Section 310(b)(4) except under the narrow circumstances discussed in this *Order*. Because additional foreign investment can promote competition in the U.S. market, we conclude that the public interest will be served by permitting more open investment by entities from WTO Member countries in U.S. common carrier wireless licensees. We will therefore replace our current ECO test as applied to foreign investment from WTO Member countries in common carrier radio licenses with the entry policies we justify and describe above in Section III.A. We note that such an analysis could apply in various contexts: petitions for declaratory rulings by existing or prospective licensees that the public interest would be served by allowing them to exceed 25 percent indirect foreign ownership; initial license applications; and transfers of control.[224]

112. We find it significant that no commenter argued that indirect foreign investment in common carrier wireless markets can raise anticompetitive dangers such as those that might occur in the context of a Section 214 application. Because those markets are, for the most part, wholly domestic, there is no possibility of leveraging foreign bottlenecks in order to create advantages for some competitors in U.S. markets. In light of the comments, we conclude that we cannot at this time envision a circumstance in which indirect foreign investments by entities from WTO Member countries that do not result in a transfer of control will pose a very high risk to competition.[225] In applying our open entry policy to Section 310(b)(4) requests, therefore, we conclude that we can streamline requests to exceed the 25 percent benchmark.[226]

113. We have responded to concerns about our consideration of Executive Branch views regarding national security, law enforcement, foreign policy, and trade policy in Section III.A.2.c. above. We accept that the Executive Branch concerns regarding national security, law enforcement,[227] foreign policy, and trade policy are legitimately addressed under the Section 310(b)(4) public interest analysis and therefore conclude that our review of Section 310(b)(4) requests should include consultation with the appropriate Executive Branch agencies regarding those concerns. Those agencies will have an opportunity to raise their concerns before authorizations are granted during the 21-day

[224] Applications for wireless licenses are of course also subject to whatever service-specific rules may apply, and transfers of control must be evaluated under Section 310(d). Any such rules are administered without regard to nationality and are consistent with U.S. GATS obligations.

[225] Thus, we will not apply an ECO analysis to investments from WTO Member countries. For a description of how we would evaluate indirect foreign ownership from WTO Member countries when the licensee or applicant also has indirect foreign ownership from non-WTO Member countries, see *infra* ¶ 131.

[226] *See infra* Section VI.A.

[227] *See supra* ¶ 106.